

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GILBERTO CERRITOS

Claimant

VS.

TYSON FRESH MEATS

Respondent

Self-Insured

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Docket No. 242,903

ORDER

Respondent appeals the April 14, 2004 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits for a 49 percent permanent partial general disability to the body as a whole on a functional basis, 19 percent of which was based upon claimant's psychological impairment. Respondent contends that claimant is limited to an impairment to the right hand only, having failed to prove a permanent psychological impairment from this injury. Claimant argues the Award should be affirmed, alleging he has proven through the testimony of psychologist James R. Eyman, Ph.D., that he suffered a permanent psychological impairment as a result of his injuries. The Appeals Board (Board) heard oral argument on July 13, 2004.

APPEARANCES

Claimant appeared by his attorney, Roger D. Fincher of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Gregory D. Worth of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

What is the nature and extent of claimant's injury? The parties acknowledge claimant is limited to a functional impairment award, having returned to work with respondent at a comparable wage. However, the dispute centers around whether claimant's injury is limited to a scheduled injury to his right hand or whether claimant has suffered an additional psychological impairment, which would modify the award to create a whole body impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file, the Board finds as follows:

Claimant suffered a severe physical injury on March 26, 1999, when, while he was assisting a worker, he had the four fingers of his right hand nearly severed after running them through a saw. Claimant was immediately taken to Newman Memorial County Hospital where the fingers were reattached. Three days later, on March 29, 1999, further surgery to fully reattach the fingers was performed by Dr. Jack Peterson. When claimant returned to work at IBP (the parent company predecessor of respondent), he was returned to work at a comparable wage, although the assistant supervisor position, to which claimant had recently been promoted, was no longer feasible, as claimant was unable, with the damage to his right hand, to assist other workers in the performance of their job duties. He was placed in a light-duty job, working in the warehouse, which is the job he occupied at the time of the regular hearing.

Claimant was examined by board certified plastic surgeon John Michael Quinn, M.D., with the first examination occurring on May 24, 1999. Dr. Quinn recommended therapy in order to eliminate some of the stiffness in claimant's fingers. Dr. Quinn continued treating claimant, utilizing MRIs and EMGs and physical therapy in order to improve claimant's ability to use his hand. Dr. Quinn felt claimant had reached maximum medical improvement by January 10, 2000, rating him, pursuant the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), at 57 percent to the hand.

Claimant was referred to James R. Eyman, Ph.D., a psychologist, at the request of claimant's attorney. Dr. Eyman initially evaluated claimant on July 7, 2000, at which time he diagnosed major depression. Claimant was treated with antidepressants, psychotherapy and ongoing medical care through claimant's authorized treating physician. Dr. Eyman last saw claimant on November 19, 2002, at which time he found claimant had improved considerably and was no longer in need of antidepressant medication. He found claimant's activities of daily living to be mildly impaired, with his concentration, persistence

and pace to be mildly impaired as well. There was no impairment with regard to claimant's social functioning or his adaptation. Dr. Eyman rated claimant at 10 percent to the body as a whole for a concentration deficit and a 10 percent impairment to the body as a whole due to claimant's activities-of-daily-living deficit. Dr. Eyman, however, acknowledged that had he utilized the DSM-IV (Diagnostic and Statistical Manual-IV), he would have agreed that claimant's major depression was in remission and that claimant did not meet the criteria set forth in DSM-IV to render a given diagnosis of psychological injury. There would, therefore, be no psychological functional impairment had that treatise been utilized.

Claimant was referred to Guillermo Ibarra, M.D., board certified in psychiatry and neurology, by the ALJ for an evaluation. Dr. Ibarra also found claimant's depression to be in remission, noting he had discontinued the use of antidepressant medications. In considering the same categories as Dr. Eyman, Dr. Ibarra found claimant had suffered no permanent impairment from a psychological standpoint.

Finally, claimant was referred to Daniel D. Zimmerman, M.D., by claimant's attorney for an evaluation on July 26, 2000. He rated claimant at 80 percent to the hand, which equates to 72 percent to the wrist or 43 percent to the whole person, as a result of the injuries to claimant's hand.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.¹ The Board acknowledges claimant suffered a severe injury to his right hand, when the fingers on his hand were nearly severed by a meat saw. The reattachment of the fingers proved to only be partially successful, with claimant suffering significant functional impairment to the hand as a result. The ALJ, in considering both the opinions of Dr. Zimmerman and Dr. Quinn, found claimant had suffered a 68.5 percent impairment to the hand at the 150-week level. The Board finds the record supports that conclusion and adopts that as its own.

The ALJ went on to find that claimant had also suffered a permanent psychological impairment based upon the opinion of Dr. Eyman. However, the Board notes that Dr. Ibarra testified that claimant's psychological condition was in remission, with no impairment found appropriate. Even Dr. Eyman acknowledged that had he utilized the DSM-IV, claimant's psychological impairment would be zero. Only by utilizing the *AMA Guides* (2nd ed.), rather than the *AMA Guides* (4th ed.), was Dr. Eyman able to conclude claimant had a permanent functional impairment from a psychological standpoint.

¹ K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

The court on many occasions refers to psychological impairment as traumatic neurosis, as was done in the case of *Love*.² There, the court set forth the general rules regarding psychological impairments or traumatic neurosis, which requires:

In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury.

It is clear claimant suffered a serious physical injury and, for a time, demonstrated signs of psychological impairment, in particular, significant depression. Dr. Eyman, however, acknowledged that claimant's depression had been successfully treated to the point where claimant was no longer on antidepressant medication and the depression itself was in remission. Both Dr. Eyman and Dr. Ibarra agreed that under the *AMA Guides* (4th ed.) and the DSM-IV, claimant would have no impairment. The Board finds that claimant did suffer a temporary psychological injury as a result of the significant damage to his hand, but that psychological injury is in remission. However, remission does not equate to a cure. The Board, therefore, finds that while claimant has no permanent impairment at this time, it would be appropriate to leave future medical and future psychological treatment open upon application to the Director should future problems or additional psychological trauma develop in the future from this injury. The Board, therefore, finds claimant has suffered a 68.5 percent functional impairment to the hand, with future medical for both physical and psychological treatment to remain open upon application to the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated April 14, 2004, should be, and is hereby, modified to award claimant a 68.5 percent permanent partial impairment to the hand at the 150-week level. Claimant is awarded 0.71 weeks of temporary total disability compensation at the rate of \$233.53 per week totaling \$166.75, followed thereafter by 102.26 weeks of permanent partial general disability compensation at the rate of \$233.53 per week totaling \$23,880.78, for a total award of \$24,047.53, all of which is due and owing and ordered paid in one lump sum minus any amounts previously paid as of this Award.

Claimant is entitled to future medical care upon application to the Director for both his physical and psychological injuries.

² *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl. ¶ 1, 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director